FILE COPY

In forma pauperis
Petition not printed

No. 669

Office-Supreme Court, U.S.
FILED
MAR 23 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

BENNY LURK, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE ON BEHALF OF MARK COPPEDGE, JR., URGING REVERSAL

BENNETT BOSKEY
1701 K Street, N. W.
Washington 6, D. C.
Attorney for Mark Coppedge, Jr. (by appointment of the Court of Appeals)

March 23, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Questions Presented	1
Interest of Amicus Curiae	3
Argument	4
Conclusion	9
Appendix	10

CITATIONS

Barry v. *United States*, D.C. Cir., January 12, 1961	11
Burns v. *Ohio*, 360 U.S. 252	7
Cash v. *United States*, 357 U.S. 219	5
Coppedge v. *United States*, No. 539 Misc.	3, 4, 5, 6, 8
Douglas v. *Green*, 363 U.S. 192	7
Edwards v. *United States*, 355 U.S. 36	5
Ellis v. *United States*, 356 U.S. 674	2, 3, 4, 5, 9
Eskridge v. *Washington State Board*, 357 U.S. 244	7
Griffin v. *Illinois*, 351 U.S. 12	7
Hansford v. *United States*, 357 U.S. 578	5
Hill v. *United States*, 356 U.S. 704	5
McAbee v. *United States*, 361 U.S. 537	5
McCrary v. *Indiana*, 364 U.S. 277	7
Ross v. *Schneckloth*, 357 U.S. 575	7
Smith v. *United States*, 358 U.S. 281	5
Smith v. *United States*, 361 U.S. 38	5
Willis v. *United States*, 362 U.S. 216	5
CONSTITUTION:	
Preamble	7
Fifth Amendment, Due Process Clause	2, 7
Fourteenth Amendment	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 669

BENNY LURK, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE ON BEHALF OF MARK COPPEDGE, JR., URGING REVERSAL[1]

QUESTIONS PRESENTED

This case presents questions which go to the very heart of the administration of criminal justice in *in forma pauperis* direct appeals from federal criminal

[1] Pursuant to Rule 42, paragraph 2, there have been lodged with the Clerk the written consents of Lurk's counsel and of the Solicitor General to the filing of this Brief Amicus Curiae.

convictions. The questions presented necessarily include the following:

1. Whether Lurk's direct appeal from a criminal conviction raised one or more "not plainly frivolous" issues entitling Lurk, despite his indigence, to have his appeal reviewed and determined on the merits by the Court of Appeals—particularly in the light of the standards so clearly enunciated by this Court in *Ellis* v. *United States*, 356 U.S. 674, and related cases; and whether the Court of Appeals, in denying leave to appeal *in forma pauperis*, failed and refused to follow the applicable *Ellis* standards.

2. Whether the Court of Appeals' refusal to allow Lurk to appeal *in forma pauperis*, and its refusal to determine his appeal on the merits, constitutes an unconstitutional (under the Due Process Clause) or an unlawful or an otherwise improper denial of justice or discrimination against indigent persons—particularly when the issues presented by Lurk's direct appeal were issues of a type which clearly would be reviewed and determined on the merits by the same Court of Appeals in a comparable case presented by a non-indigent appellant.

3. Whether the Court of Appeals' unlawful and unjust course of action in its handling of Lurk's appeal is cured because of the Government's assertion to this Court that the Court of Appeals actually did afford Lurk a review on the merits of his appeal—even though, contrary to such assertion by the Government, the Court of Appeals did just the opposite and acted on the basis of plainly incorrect

claims which the Government made to the Court of Appeals claiming that Lurk's appeal raised no substantial question.

INTEREST OF AMICUS CURIAE

Mark Coppedge, Jr. is in a situation comparable to Lurk's. Indeed, if any difference exists between the two cases, the difference is that the substantial questions raised by Coppedge's direct appeal were far more numerous and hence the error of the Court of Appeals in refusing Coppedge leave to appeal *in forma pauperis* was even more egregious.

Coppedge now has pending in this Court a petition for certiorari to the Court of Appeals for the District of Columbia Circuit, No. 539 Misc., seeking reversal of the Court of Appeals' order denying him leave to appeal *in forma pauperis*. In Coppedge's case comparably to what was said in Lurk's, the Government represented to the Court of Appeals that the issues raised on direct appeal were "not sufficiently substantial for this Court of Appeals to grant an appeal *in forma pauperis*". In Coppedge's case as in Lurk's, such a claim was fantastic, particularly in the light of the standards this Court enunciated in *Ellis* and related cases.[2] In Coppedge's case as in Lurk's, the Court of Appeals ignored the applicable standards established by this Court's decisions, and denied leave to appeal *in forma pauperis*.

In Coppedge's case as in Lurk's, the Government's Brief in Opposition filed in this Court[3] did not make

[2] The Appendix to this Brief Amicus Curiae lists the substantial questions—each of them "not plainly frivolous"—which are raised in Coppedge's appeal.

[3] Not by the present Solicitor General, but by his predecessor.

the slightest suggestion of reiterating to this Court what the Government had told the Court of Appeals—namely, that the questions raised in the Court of Appeals were "not sufficiently substantial" to meet the *Ellis* standards. Having succeeded in the Court of Appeals, on this totally untenable ground, in persuading the Court of Appeals to refuse to hear and determine on the merits these direct appeals, the Government's Briefs in Opposition—in Coppedge's case as well as in Lurk's—then came in to tell this Court that in the Court of Appeals the appeals really had been fully considered and determined on the merits already.

ARGUMENT

The fair and just handling of *in forma pauperis* cases constitutes one of the major problems confronting the courts in the administration of federal criminal justice. This is particularly true within the District of Columbia Circuit, where the *in forma pauperis* business of the courts is especially heavy.

In the effort to provide all the federal courts with clear and unequivocal guidance as to the standards applicable to allowance of *in forma pauperis* appeals, this Court held in *Ellis* v. *United States*, 356 U.S. 674, 674-675, that:

> "The only statutory requirement for the allowance of an indigent's appeal is the applicant's 'good faith'. 28 U.S.C. § 1915. In the absence of some evident improper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous. *Farley* v. *United States*, 354 U.S. 521. The good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues raised are so frivolous that the appeal

would be dismissed in the case of a nonindigent litigant, Fed. Rules Crim. Proc. 39(a), the request of an indigent for leave to appeal *in forma pauperis* must be allowed."

In far too many cases the teachings of *Ellis*, instead of finding a sympathetic reception in the District of Columbia Circuit, have met with outright rejection. Time and again, as it did in *Ellis*, this Court has found it necessary and appropriate to take corrective action and unanimously reverse the District of Columbia Circuit, so that the Court of Appeals would be required by this Court's specific direction to hear and determine on the merits an *in forma pauperis* criminal appeal. *Edwards* v. *United States*, 355 U.S. 36; *Hill* v. *United States*, 356 U.S. 704; *Cash* v. *United States*, 357 U.S. 219; *Hansford* v. *United States*, 357 U.S. 578; *Smith* v. *United States*, 358 U.S. 281; *Smith* v. *United States*, 361 U.S. 38; *McAbee* v. *United States*, 361 U.S. 537; compare *Willis* v. *United States*, 362 U.S. 216. In every one of these cases the District of Columbia Court of Appeals had cut off an indigent appellant from having his appeal heard and determined on the merits—just as it has done with Lurk and Coppedge—and in every instance this Court reversed.

The fact that so many reversals have been necessary—and that despite them the Court of Appeals in *Lurk* and in *Coppedge* has continued on its erroneous course of conduct—is eloquent proof of the gross misconception which prevails in the District of Columbia Circuit concerning the applicable legal standards on this subject. The Court of Appeals has persisted in applying its own views as to the governing standards, despite the wide gap which has been shown to exist between its views and the unanimous views of this

Court. In this area the District of Columbia Court of Appeals repeatedly has manifested a propensity to differ rather than defer.

If Lurk or Coppedge had been non-indigent appellants, their appeals would in fact have been heard and determined on the merits by the Court of Appeals. For example, it is understood that there are very few (if any) cases in recent years where the District of Columbia Court of Appeals dismissed as frivolous a direct criminal appeal brought to it on a paid basis by a non-indigent appellant, whereas during the fiscal year 1960 alone there were about 30 direct criminal appeals by indigent appellants in which the District of Columbia Court of Appeals denied leave to proceed *in forma pauperis*. No principles of natural selection—except those fostered by basically discriminatory practices—would account for a situation in which indigent appellants so frequently are held to be presenting frivolous appeals from criminal convictions but appellants able to pay their way are never (or virtually never) held to be doing so.

Indeed, anyone who reads the month-by-month output of opinions of the District of Columbia Court of Appeals in non-indigent criminal cases would have no doubt that Lurk's and Coppedge's appeals, had they come from non-indigent appellants, would have been fully heard and determined on the merits. Even a casual inspection will show that the Court of Appeals' opinions in its non-indigent criminal appeals are filled with appellate determinations on the merits of issues far less substantial than the issues Lurk and Coppedge tendered.

These circumstances emphasize the gravity of the unlawful and improper discrimination being practiced

against Lurk and against Coppedge because of their indigence. This is discrimination of the type which the Fourteenth Amendment prohibits the States from practicing. *Griffin* v. *Illinois*, 351 U.S. 12; *Eskridge* v. *Washington State Board*, 357 U.S. 214; *Ross* v. *Schneckloth*, 357 U.S. 575; *Burns* v. *Ohio*, 360 U.S. 252; *Douglas* v. *Green*, 363 U.S. 192; *McCrary* v. *Indiana*, 364 U.S. 277. "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. . . . [A]t all stages of the proceedings the Due Process and Equal Protection Clauses [of the Fourteenth Amendment] protect persons like petitioners from invidious discriminations." *Griffin* v. *Illinois*, supra, 351 U.S. at 18. This type of discrimination is at least equally violative of the Fifth Amendment's Due Process Clause, and at least equally violative of the entire spirit of fairness and equality upon which our judicial institutions are founded.

The Court of Appeals has inflicted on Lurk and on Coppedge because of their indigence a denial of justice which should be made impossible under a Constitution whose Preamble recognizes the great purposes of our free society to "establish Justice" and to "secure the Blessings of Liberty". The poor as well as the rich are entitled to have their criminal appeals fully heard and determined on the merits—at least when issues "not plainly frivolous" are raised by the appeal. In administration of federal criminal justice there is no room for discriminatory procedures which would relegate the indigent to a kind of second-class citizenship. Indigent appellants must not be made beggars for the

justice which every non-indigent appellant can obtain from the Court of Appeals as a matter of regular course.

A word should be added concerning the Brief in Opposition which the Government filed in this Court in *Coppedge*, comparable to what it said in *Lurk*. There the Government took the wholly spurious position that the appeal had "in effect already been granted and considered" by the Court of Appeals and "in effect the case was presented to the court below on its merits and was presumably disposed of on that basis". The simple answer to this is that plainly it is not so. No amount of misdescription by the Government can alter the fact that in both cases the Court of Appeals has denied, and not granted, an appellate review of the merits. The Government tendered its strange assertion to this Court despite all the facts: the Court of Appeals did not order that leave to appeal be granted, but instead ordered that such leave be denied; the Court of Appeals did not order the records in the cases to be transmitted to it from the District Court for review; the Court of Appeals did not allow the cases to be briefed on the merits; the Court of Appeals did not allow the cases to be orally argued on the merits, or even otherwise; the Court of Appeals did not render any opinion or order on the merits; the Court of Appeals did not express any views whatever on the merits of any of the issues raised; the Court of Appeals did not say or show that it had given any particular consideration to any of the issues raised; and the Court of Appeals did not in any other manner purport to give the cases full appellate review.

The Court of Appeals and the Government have alike embarked on courses of action which would

scuttle *Ellis* and would defeat the great principles of Equal Justice under Law. This cannot be accomplished as long as this Court sits.

CONCLUSION

The Court of Appeals has flagrantly departed from applicable legal standards. Unless this Court should decide to make its own full determination on the merits of the issues raised by Lurk's appeal, the case should be remanded to the Court of Appeals with instructions to that Court to give a full and prompt appellate review on the merits.

Respectfully submitted,

BENNETT BOSKEY
1701 K Street, N. W.
Washington 6, D. C.

Attorney for Mark Coppedge, Jr.
(by appointment of the Court of Appeals)

March 23, 1961

APPENDIX

Substantial Questions, Each of Them "Not Plainly Frivolous", Presented by Coppedge's Appeal

1. The group of substantial questions presented as to the validity of the indictment:

   A. Whether the indictment is open to attack on the ground that the grand jury based its action on important testimony shown before the trial to have been false and perjured.

   B. Whether an indictment based on substantial false and perjured testimony is automatically salvaged by the fact that "other competent evidence" may have also been before the grand jury.

   C. Whether the grand jury transcript should have been made available to defense counsel as demanded.

   D. Whether in any event the District Court erred in determining that there was other competent evidence before the grand jury sufficient to support the indictment.

   E. Whether in any event the District Court, before determining that the indictment should be upheld, should have made a factual inquiry into whether government agents were responsible for inducing false and perjured testimony by Clarence Thompkins for presentation to the grand jury.

2. The substantial questions presented as to Judge Holtzoff's summary denial of motions that he should disqualify himself.

3. The substantial questions presented as to prejudice resulting from prosecution's use of testimony previously given at the first trial by the co-defendant Artis, who was unavailable as a witness at the second trial:

   A. Whether Judge Holtzoff erroneously excluded evidence showing that Artis, subsequent to the first trial, had entirely retracted his testimony implicating Coppedge in the offenses.

   B. Whether Judge Holtzoff erroneously failed and refused to inform the jury of the deficiencies and

weaknesses he himself had noted in Artis' testimony at the first trial.

C. Whether the trial court's failure to require the Government to produce the original of a statement in its possession, signed by Artis, was error and in violation of the Jencks Act, 18 U.S.C. § 3500.

D. Whether errors were committed in receiving the rebuttal testimony of FBI Agent Darragh on the Artis matter.

E. Whether under the unusual circumstances of this case the first-trial testimony of Artis should have been entirely excluded.

4. The substantial question presented as to whether corroboration should be required in the District of Columbia to support a conviction based on accomplice testimony.

5. The substantial question presented as to whether the prosecutor's summation was prejudicial to a fair trial and unfairly vouched for veracity of Government witnesses.

6. The substantial question whether the charge was defective for reasons which the Court of Appeals, in *Barry* v. *United States*, decided January 12, 1961, held to constitute plain error requiring reversal.

---

* The Court of Appeals' decision in *Barry* occurred subsequent to the filing of Coppedge's petition for certiorari; accordingly, this substantial question has not yet been presented to the Court of Appeals, but was raised in the Reply filed in this Court on January 18, 1961, and will be availed of in the Court of Appeals if Coppedge's case is remanded to that Court for a briefing and determination of the appeal on the merits.